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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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# No. 600

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ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

*vs.*

J. L. POWE, ADMINISTRATOR OF GEORGE A. MARSHALL,
DECEASED, RESPONDENT.

---

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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(35,522)

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DECEASED, RESPONDENT.

---

## PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable the Supreme Court of the United States:*

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on writ of *certiorari* a judgment of the Supreme Court of the State of South Carolina in the case of *J. L. Powe, as administrator of George A. Marshall, deceased, versus Atlantic Coast Line Railroad Company,* rendered on the 19th day of September, 1930, as shown by a true

copy of the record therein, herein filed (R. 81). Under the practice prevailing in South Carolina, no final judgment, separate from the opinion of the Supreme Court, is rendered, and the opinion is the final judgment. See clerk's certificate (R. 114).

This case has heretofore been before this Court on petition for *certiorari* under the style of *Atlantic Coast Line Railroad Company, petitioner, versus C. M. Tyner, as administrator of George A. Marshall, deceased* (No. 747, October term, 1927), in which petition for *certiorari* was granted (276 U. S. 613), and after final argument and hearing the judgment for respondent Tyner was reversed and the cause remanded (278 U. S. 656) in a *per curiam* decision rendered on October 29, 1928, reading as follows:

> "Reversed and remanded for a new trial on the authority of (1) *Chicago, M. & St. P. R. Co. vs. Coogan*, 271 U. S. 472; (2) *Southern P. Co. vs. Berkshire*, 254 U. S. 415; *Chesapeake & O. R. Co. vs. Leitch*, 276 U. S. 429; (3) *Gulf, C. & S. F. R. Co. vs. Moser*, 275 U. S. 133."

The respondent administrator, C. M. Tyner, died and on September 19, 1929, J. L. Powe, who had been appointed administrator of George A. Marshall, deceased, was substituted as plaintiff in the cause (R. 1).

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action was brought, tried and decided under the Federal Employers' Liability Act, and it was also

alleged in the complaint and admitted in the answer that both intestate and the Railroad Company were engaged in interstate commerce at the time of the injury (R. 1, 3, 7). The action was brought to recover for the alleged negligent death of respondent's intestate, George A. Marshall, who was employed by petitioner as a switchman in the yard at Charleston, South Carolina, and was found dead in the early morning of January 6, 1923, the body lying about twenty or twenty-five feet south of Semaphore No. 3911, which is on the west side of petitioner's main-line track, between Charleston and Bennetts Yard (R. 11, 23, 24). The theory of liability alleged in the complaint was that decedent was riding on some cars on petitioner's main-line track at or near Charleston, South Carolina, going in the direction of that city, at about three o'clock in the morning, and the cars were stopped by reason of trouble with some of the brakes, causing Marshall to get down to correct the trouble, and that while he was mounting the ladder attached to one of the cars, after they started again, or while he was examining the defective car, the defects in which were due to petitioner's negligence, he was struck by a semaphore or signal device which petitioner had negligently caused to be placed too close to the track, so as to leave an insufficient space between it and the side of the train (R. 4, 5).

The evidence given at the first trial of this cause, in which the judgment was rendered which was reversed by this Court, was much fuller and more detailed on material points than the testimony given at the second trial, since none of the trainmen on the train on which

he was alleged to have been riding shortly before his death testified on the second trial. Accordingly, *there is no testimony in this record by anyone that decedent was on the side of any car of petitioner, or even that a train passed the semaphore that night, near which decedent was found dead.* Apparently, respondent seeks to supply the lack of such testimony by reliance on alleged admissions claimed to be contained in petitioner's plea of contributory negligence, hereinafter set out, which was admitted in evidence by the trial court over objection, and such admission sustained by the State Supreme Court. Except two orders of the Railroad Commission of South Carolina, which were introduced by petitioner, all the evidence in the case was offered by respondent. The testimony of an exhumation of decedent's body, made six years after his death, showed that his skull in the back of the head was crushed in (R. 29, 49), which must have been caused by a terrific blow in that part of his skull, and could not, according to the opinion of the medical witness, be caused by falling from the train on the ground (R. 31), but was caused by coming in contact, with force, with a hard object. Decedent was instantly killed, but might not have relaxed immediately (R. 34, 35). The only evidence as to the finding of the body is that of the coroner, Mansfield (R. 23), who arrived at the scene of the accident about 3:30 a. m. (R. 24). When the coroner arrived, there were a number of people standing around the scene of the accident where decedent's body was found, which was 20 to 25 feet south of semaphore 3911 (R. 24). The coroner found the dew brushed off of the *east* side of the semaphore about

4 or 5 feet from the ground (R. 24, 25). Decedent's brother-in-law, C. G. Tyner, who did not testify at the first trial and who got to the scene of the accident about noon the next day, or nine or ten hours after the body was discovered by others, testified (R. 49, 51) that about four feet from the base of the semaphore he found that something had wiped the smoke and soot off, and about six or seven inches farther there were, apparently, blood stains on the north side of the semaphore casing.

The evidence for respondent shows that from the base of semaphore No. 3911, twenty or twenty-five feet *south* of which decedent's body was found, to the nearest outside rail of petitioner's track, the distance was *four feet ten inches*, and from the base of this semaphore post to the outside cross-tie three feet and two inches, and from the outside rail to the top of the base of the signal post four feet nine inches (R. 14, 15, 17). A civil engineer testified for respondent that he measured the distance from the rail of four semaphores, No. 3911, No. 3901, No. 3906, and No. 3916; that from the base of 3911 to the outer edge of the west rail of petitioner's track the distance was four feet five and one-quarter inches, and from a point about three feet above the ground it was *four feet seven and one-half inches* from the rail (R. 21); that the distance from the base of semaphore 3906, just south of the preceding one, to the west rail was five feet nine inches, and the similar distance from the base of 3901 was seven feet six and one-half inches, and that the distance from the west rail to the base of semaphore 3916 was six feet seven and three-quarters inches (R. 18, 19). Sema-

phore 3911 is on a straight track, and some of the others are on a curve (R. 20). These distances would be the same up to about six feet four inches of the semaphore, when they would become somewhat greater, around six inches difference (R. 21). This witness did not know the location of these semaphores and of the track in 1923, when decedent was killed, and did not measure any other semaphores, as he was only asked to measure these particular semaphores (R. 21). These semaphores are placed along the road as safety devices for the operation of trains (R. 22).

The orders of the South Carolina Railroad Commission adopted in 1916, as amended, which were enacted for the safety of the public "and employees of the railroad" (R. 55, 56), provided "that no obstruction be allowed erected or maintained at any point other than station grounds *nearer than four feet* from the outer edge of the main or side track rail of any railroad in the State of South Carolina, *measurements being made four feet above the top of rail.*"

The seventh allegation of petitioner's answer, setting up the defense of contributory negligence (R. 54), was admitted in evidence over petitioner's objection, and reads:

> "Seventh. Further answering said complaint, and for a further defense to said action, this defendant alleges that the injuries and death of the deceased were due to and caused by the negligence of the said deceased contributing to and combining and concurring with the alleged negligence of the defendant and constituting a proximate cause thereof, without which the same

would not have happened, in the following particulars, to wit:

"(*a*) In not going directly to the roof of the freight car on which he was riding *as instructed by the conductor of said train,* but in remaining on the side of the car, *contrary to said orders and instructions.*

"(*b*) In not keeping a proper lookout for the signal devices and other obstructions which are ordinarily erected on the side of tracks of the defendant, near said tracks.

"(*c*) In failing and omitting to keep a proper lookout for the semaphore mentioned in the complaint herein, *whose presence and location were well known to the deceased.*

"(*d*) In leaning outward from the ladder of said freight car so as to bring his body in contact with the said semaphore erected at a greater distance from the track than is required by the regulations of the South Carolina Railroad Commission, hereinbefore set forth." (Italics ours.)

In explanation of his admission of this part of petitioner's answer as evidence, the trial court charged the jury (R. 73) as follows:

"Now that brings up the same question again, I think, and I charge you that *the statements of fact set out in paragraph seven you may consider.* As to any admission whatsoever of negligence against the Atlantic Coast Line Railroad Company, you can't consider. It is only those statements of fact set out in paragraph seven which facts they allege constitute contributory negligence. As I say, *contributory negligence*

*goes out of the case,* but the facts set out there and upon which they sought to base their charge of contributory negligence you may consider. The rest of it you can't consider at all." (Italics ours.)

Petitioner's answer, after admitting certain facts in its first paragraph, in the second paragraph thereof denied "each and every other allegation in said complaint, not hereinabove or hereinafter specifically admitted." The answer did not elsewhere admit that decedent was on the side of a car, or on a car, when struck by a semaphore (if he was), unless the plea of contributory negligence above set out can be properly held to admit, for evidential purposes, that fact. The State Supreme Court upheld the admission in evidence of this part of petitioner's answer. If this part of the answer were admissible at all, the facts stated therein were wholly undisputed and showed that decedent rode on the side of the car contrary to the *conductor's orders,* and also showed that he well knew of the "presence and location" of the semaphore, but the State courts did not give any legal effect to these undisputed facts in deciding either the question of assumed risk or whether there was actionable negligence.

A witness formerly employed as a railroad trainman, but who did not even profess to have seen the accident, making the assumption that the body was found twenty to twenty-five feet south of the semaphore, testified that the speed of the train from which decedent was thrown (if he was) must have been between twenty-five and thirty miles an hour, attempting to qualify himself to give this opinion by stating that he

had seen packages and sacks thrown from moving trains (R. 38, 39). This is the only testimony in the record as to the speed of any train on which decedent was alleged in the complaint to have been. Respondent produced no witness to testify (*a*) that decedent was on any train when killed, (*b*) the time when decedent was killed, or (*c*) where he was when killed. Several witnesses testified for respondent that when freight trains were running at a speed of twenty to twenty-five or thirty miles an hour they sway from side to side from ten to twenty inches, the sway beginning about a little midway the car (R. 39, 44, 50), and there was also testimony that the whole car swayed down to the truck. Respondent's testimony also showed that decedent, while working as a switchman, necessarily went out past this semaphore (R. 40, 41), and all railroad men know that freight cars sway from side to side in that way, and also know about semaphores being along the side of the track (R. 40, 41, 42, 45, 46, 47, 53). Petitioner's Rule No. 706, which was in force in 1923, when respondent was killed, provides:

> "Employees are required to inform themselves respecting the location of all structures or obstructions along the line which will not clear them *when on the top or sides of cars*" (R. 53). (Italics ours.)

Decedent, Marshall, was an experienced railroad man and had worked in the Charleston Yard as a switchman three weeks at the time he was killed, and for about three months before that time at the same place

(R. 12), and had also worked for appellant as switchman for about two years, at Florence, South Carolina (R. 13). There was general testimony by a former trainman of petitioner, who did not see the accident, that it was a switchman's duty to watch the brakes and find out when anything got out of order, and to do so he would have to ride where his duties called him, and also that box cars are equipped with side and end ladders for employees to use in going up and down (R. 39, 40). In sustaining the trial court in refusing to direct a verdict for defendant, petitioner here, on the ground that no actionable negligence had been proven on its part, the Supreme Court of South Carolina says:

> "A careful analysis of the evidence is convincing that this exception cannot be sustained. It was shown that the base of the semaphore was four feet ten inches (4′ 10″) from the track, only ten (10) inches more than the minimum allowed by the Railroad Commission; that when the train was running twenty or twenty-five miles an hour the car swayed from eight (8) to twenty (20) inches. *Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the ladder two and one-half (2½) inches, more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphores and the ladder was two feet three and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half inches (1′ 7½″) to seven and one-half (7½″)*

*inches.* Taking into consideration the swaying, of course, and the thickness of a man's body, the jury could have well concluded that the semaphore was placed within an unsafe distance of a moving train."

There is absolutely no evidence in the record to sustain the facts set forth above in italics, or any statement in the record of the distances mentioned by the South Carolina Supreme Court. The said court, therefore, must have considered in evidence in this case facts which were in evidence upon the first trial alone and which were not produced upon this one.

Judgment was rendered for respondent in the sum of $30,000.00 (R. 2), which judgment was affirmed by the Supreme Court of South Carolina on September 19, 1930, as shown by its opinion and judgment in the record, Cothran, J., dissenting, however (R. 81).

## II.

Your petitioner earnestly contends that writ of *certiorari* should be granted by this court to review and reverse the judgment of the State Supreme Court herein because:

(1) The undisputed evidence herein is wholly insufficient to prove actionable negligence by petitioner (R. 73). The opinion of the State Supreme Court indicates that it, apparently, considered, in deciding this question, some facts which were in evidence on the first trial *but were not put in evidence on the second trial and not in this record.*

*Toledo, St. L. and W. R. Co. vs. Allen,* 276 U. S. 165.

*Chesapeake & Ohio R. Co. vs. Leitch*, 276 U. S. 429.

*McCully vs. Monongahela Ry. Co.*, 289 Pa. 393, 137 Atl., 623, certiorari denied in 275 U. S. 542.

(2) The evidence herein is wholly insufficient to show the proximate cause of decedent's death and leaves that question entirely to conjecture (R. 74).

*Chicago, M. & St. P. R. Co. vs. Coogan*, 271 U. S. 472.

*Atlantic Coast Line R. Co. vs. Tyner*, 278 U. S. 565.

(*a*) The State courts erred in arbitrarily admitting in evidence petitioner's plea of contributory negligence, and in giving it effect as evidence (R. 71).

*Glenn vs. Sumner*, 132 U. S. 152.

*Norfolk Southern R. Co. vs. Ferebee*, 238 U. S. 269.

(3) Under the undisputed evidence decedent assumed, as a matter of law, the risk of injury from coming in contact with the semaphore in question (R. 73). Aside from other sufficient evidence in the record, the facts stated in the seventh paragraph of petitioner's answer, if admissible in evidence, showed that decedent well knew of the "presence and location" of the semaphore and, of themselves, showed assumption of risk.

*Atlantic Coast Line R. Co. vs. Tyner*, 278 U. S. 565.

*Southern Pac. Co. vs. Berkshire*, 254 U. S. 415.

*Chesapeake & O. R. Co. vs. Leitch*, 276 U. S. 429.

WHEREFORE, because said decision and judgment of the State Supreme Court decided the foregoing Federal questions in a way not in accord with the applicable decisions of this court, your petitioner prays that a writ of *certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the Supreme Court of South Carolina, be ordered to be reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
ARTHUR R. YOUNG,
V. E. PHELPS,

*Attorneys for Petitioner, Atlantic Coast Line Railroad Company.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

# No. 600

ATLANTIC COAST LINE RAILROAD COMPANY,
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*vs.*

J. L. POWE, ADMINISTRATOR OF GEORGE A. MARSHALL,
DECEASED, RESPONDENT.

## BRIEF FOR PETITIONER.

### Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported. It is found on page 81 of the record.

### Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is September 19, 1930.

This action was brought, tried and decided by the State courts under the Federal Employers' Liability Act of 1908 (R. 3, 4, 7 and opinion of State Supreme

Court, page 81 of record). The present judgment was rendered on the second trial of this case, after this Court (*Atlantic Coast Line Railroad Company vs. Tyner,* 278 U. S. 565) had reversed and remanded for new trial a former judgment for respondent in the sum of twenty-eight thousand eight hundred ($28,800.00) dollars. On the second trial judgment was rendered for respondent for thirty thousand ($30,000.00) dollars (R. 2), and petitioner appealed to the State Supreme Court. The judgment was affirmed by the South Carolina Supreme Court (R. 81), Cothran, J., dissenting.

The jurisdiction of this Court is invoked under the Federal Employers' Liability Act of 1908, Act. Congress approved April 22, 1908, as amended, and under Judicial Code, Section 237, as amended by Act Congress September 6, 1916, Chapter 448, Section 2, and Act Congress February 13, 1925, Chapter 229, Section 1.

The cases believed to sustain the jurisdiction of this court are:

*Atlantic Coast Line Railroad Co. vs. Tyner,* 278 U. S. 565.

*Southern Pacific Ry. Co. vs. Berkshire,* 254 U. S. 415.

*Chesapeake & O. Ry. Co. vs. Leitch,* 276 U. S. 429.

*Chicago, M. & St. P. R. Co. vs. Coogan,* 271 U. S. 472.

*Toledo, St. L. & W. R. Co. vs. Allen,* 276 U. S. 165.

*McCully vs. Monongahela Ry. Co.,* 289 Pa. 393, certiorari denied in 275 U. S. 542.

## Statement of Case

All of the relevant facts are fully set out in the petition, and will be stated in the body of this brief in so far as may be necessary to a discussion of the several questions involved; repetition here will, therefore, be unnecessary.

### Point I.

**The undisputed evidence herein is wholly insufficient to prove actionable negligence by petitioner in placing its semaphore.**

This question is raised by petitioner's third exception (R. 73).

In discussing this question it will be assumed (which the testimony does not at all show) that decedent may have been on a train passing this semaphore when he was killed and near which his body was found. The facts developed at the second trial with respect to the distance the semaphore was from the railroad track are not materially different from those in evidence at the first trial, though other facts bearing on the question of negligence, as alleged in the complaint, which were in evidence on the first trial, were not put in the evidence at the second trial and are not found in the present record. The negligence alleged in the complaint, is in substance (R. 4, 5), that decedent was riding on some cars on the main line track at or near Charleston, about three o'clock A. M., and the train was stopped by reason of some trouble with some of

the brakes on the cars, causing decedent Marshall to get down to correct the trouble, and that after the cars had started again and either while he was mounting the ladder attached to one of the cars, or while he was examining the defective car, the defects in which were due to petitioner's negligence, thereby necessitating decedent examining the same, he was struck by a semaphore or signal device which petitioner had negligently caused to be placed too close to the track, so as to leave an insufficient space between it and the side of the train (R. 4, 5, 6). There is no testimony whatever in the present record that decedent was examining a car, or that there were any defects in the brakes of a train he was on, and no evidence whatever to show that his duties at the time required him to be on any train of petitioner, on the side of a car, or elsewhere; and there is, likewise, no evidence that decedent was even on any train of petitioner the night he was killed, unless the seventh paragraph of petitioner's answer, set out in the petition herein, is competent evidence of that fact. Admittedly, decedent's body was found 20 to 25 feet south of semaphore No. 3911. One of respondent's witnesses testified that the distance from the base of semaphore 3911 to the nearest (west) outside rail of the track was 4 feet 10 inches (R. 17). This was the distance taken in the opinion of the State Supreme Court. This witness further testified that the distance from the base of this semaphore to the outside cross tie was 3 feet 2 inches, and from the outside rail to the top of the base of the semaphore 4 feet 9 inches (R. 14, 15, 17). Another witness for

respondent, who made his measurements about six years after the accident, testified that he measured the distance from the rail to four of petitioner's semaphores, Nos. 3911, 3901, 3906 and 3916. That from the base of 3911 to the outer edge of the west rail of the track the distance was 4 feet 5¼ inches, and from a point 3 feet above the ground it was 4 feet 7½ inches (R. 21) from the rail; that the distance from the base of semaphore 3906, just south of the preceding one to the same west rail, was 5 feet 6½ inches, and that the distance from the west rail to the base of semaphore 3916 was 6 feet 7¾ inches (R. 18, 19).

In analyzing the evidence on the question of negligence, the Supreme Court of South Carolina says in its opinion (R. 90):

> "Under the testimony the car projected beyond the track a distance of two feet four inches (2′ 4″) with the ladder two and one-half (2½) inches more, making a total projection of two feet six and one-half inches (2′ 6½″); that when the car was at rest the clearance between the semaphore and the ladder was two feet three and one-half inches (2′ 3½″); that the clearance when the car was moving at a rate of twenty (20) or twenty-five (25) miles per hour would be from one foot seven and one-half (1′ 7½″) to seven and one-half (7½″) inches."

*There is not a scintilla of evidence in the record to sustain this statement, or any statement, of the distances mentioned by the State Supreme Court.* That Court is wholly in error in supposing that there is any such evidence in the record. There is no evidence

showing, either directly or by any possible inference, the distance between the side of a car and the semaphore in question or how far a car projects from the rail, when standing still or in motion. Some of these facts were in the record of testimony *taken on the first trial,* or were inferable therefrom, *i. e.*, that the distance between the rails was 4 feet 7½ inches, the width of a box car 9 feet 3½ inches, and that the side ladder projected 2½ inches therefrom, and the State Supreme Court, in its opinion on the first appeal to it (*Tyner, Admr. vs. Atlantic Coast Line Railroad Company*), 149 S. C. 89, 146 S. E. at page 671, in which its judgment was reversed by this court for a new trial, referred to the facts above set out. It would seem, therefore, that the State Supreme Court, on this second appeal, considered facts in evidence on the *first trial,* which were not in evidence or before the jury on the second trial, and the vice of this course is noted by Cothran, J., in his dissenting opinion herein (R. 97). But, clearly, facts not in evidence on the second trial or before the jury, cannot properly be considered by the appellate court.

*4 Corpus Juris, title "Appeal and Error"*, page 647, Sec. 2572.

*Spriggs vs. Jamerson,* 115 Va. 250, 78 S. E. 571.

*Milas vs. United Oil Co.,* 264 S. W. 761-763 (Ky.).

*Beckett vs. Stuart,* 40 Cal. App. 108, 180 Pac. 348.

The only additional evidence in the present record to that above set out in this brief, at all bearing on the

question of negligence, is testimony of several witnesses that when freight trains run at a speed of from twenty to thirty miles an hour they sway from side to side from ten to twenty inches (R. 39, 44, 50), but the only testimony as to the speed of any train on which decedent was supposed to have been when passing the semaphore, was given by a witness who did not pretend to have seen the accident, but was permitted to testify that, assuming decedent's body was found twenty to twenty-five feet south of the semaphore, the speed of the train from which decedent was thrown was between twenty-five and thirty miles an hour; and the *sole qualification* of the witness who was permitted, over objection, to give this opinion as to the speed of the train, was that he had seen *packages and mail sacks thrown from moving trains* (R. 38, 39). We submit that this opinion testimony, or rather arbitrary guess, as to the speed of the train on which decedent was supposed to have been riding, does not rise to the dignity of evidence and is incompetent, and cannot be deemed that kind of substantial testimony which will impose liability under the Federal Act.

In the case of *Gulf, M. & N. R. Co. vs. Wells*, 275 U. S. 455, this court refused to give any material weight to testimony of a brakeman, injured by falling while boarding a moving train, that the engine gave an unusual jerk at the time he attempted to board, stating that such testimony was obviously a mere conjecture, since the trainman was then at the side of caboose where he could not see what occurred on the engine. As there is no proper testimony as to the

speed of any train that decedent may have been on when he passed the semaphore (if he did), the testimony as to the sway of the car at that speed must also go out of the case, leaving the only substantial testimony in the case to the effect that the base of semaphore 3911 was 4 feet 10 inches from the nearest outside rail of the track, or, as stated by another witness, 4 feet 7½ inches (R. 14, 20, 21). Do these few facts make out a case of negligence in placing the semaphore, under the applicable authorities?

We submit the decision in this case is ruled by, and must be decided under, the former decision of this court in *Atlantic Coast Line Railroad Company vs. Tyner*, 278 U. S. 565, reversing the former judgment for respondent and remanding the case for a new trial. In its *per curiam* opinion of reversal this court cited, among others, the following cases:

*Southern Pac. Ry. Co. vs. Berkshire*, 254 U. S. 415.

*Chesapeake & O. R. Co. vs. Leitch*, 276 U. S. 429.

Both of these cases involved injury to trainmen by coming in contact with mail cranes along the track. Respondent's counsel, as well as the State Supreme Court, take the position that these cases are limited in their application to cases involving mail cranes, which are erected under regulations of the post office department and are required to be placed very close to the track; but, obviously, this distinction is not sound, since this court would not have cited these cases in its opinion in the *Tyner* case in reversing the judg-

men, unless it deemed them applicable to this case, *which is not a mail crane case.* Furthermore, the opinion in the *Leitch* case, which deals with the question of negligence, as well as assumed risk, clearly shows on its face that its principle is not limited to mail cranes. In the *Leitch* case the court said:

> "*The grounds of that decision were that it is impracticable to require railroads to have no structures so near to their tracks as to endanger persons who lean from the windows of the cars;* that they are obliged to erect mail cranes near enough to the tracks for the train to pick up mail sacks without stopping; that it is almost if not quite impossible to set the cranes so far away as to leave no danger to one leaning out, and that in dealing with a well known incident of the employment, adopted in the interest of the public, it is unreasonable to throw the risk of it upon those who were compelled to adopt it.
>
> "Of course it is answered that these general considerations should not exonerate the railroads from using such care as they can within the conditions. *But it seems to us unjust to let the risk of a danger that in any event is imminent vary upon disputed evidence that the danger was brought an inch or two nearer than it would have been if a blue print adopted for the whole line had been followed with a more precisely mathematical accuracy.*

In the Berkshire case the testimony for the plaintiff left a distance of fourteen inches from the end of the crane to the car. Here the plaintiff's witness makes it *ten.* The witnesses for the petitioner with greater plausibility make it

> appreciably more. If there is to be a standard in these cases, and if, as decided, the general rule is that the engineer takes the risk, the railroad should not be made liable for this class of injury except where some unquestionable disregard of obvious precautions is shown." (Italics ours).

The general principle enunciated by the decisions of this court with respect to liability of a railroad company on account of injury to trainmen from coming in contact with permanent structures along the track, is that the location of such facilities is primarily a matter for the exercise of the judgment and discretion of the carrier, and it should not be made liable for this class of injuries, as stated in the *Leitch* case, "except where some unquestionable disregard of obvious precautions is shown". The case of *Toledo, St. L. & W. R. Co. vs. Allen*, 276 U. S. 165, involved the application of the same principle and on page 180 the court said:

> "The rule of law which holds the employer to ordinary care to provide his employes a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & O. R. Co. v. Croeger*, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169, Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employes. *Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and vary-*

> *ing opinions of juries. Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri P. R. Co. v. Aeby, supra.* The court erred in submitting that question to the jury." (Italics ours.)

The clearance between cars on the tracks involved in that case was "only about 2 feet 9 inches, without considering the grab irons * * * projecting 4½ inches from each corner" of the cars.

The case of *McCully vs. Monongahela Ry. Co.* 289 Pa. 393, *certiorari* denied in 275 U. S. 542, is so closely in point both in principle and on the facts, as to justify a quotation from the opinion of the State Supreme Court. That case involved injury to a locomotive fireman, by coming in contact with the upright supports of a coal tipple built over the track, while leaning out of the cab. There was only a clearance of *18 inches* between the upright and the cab. The State Supreme Court said:

> "To hold a railroad liable in damages for improper construction of its appliances or structures it is necessary to convict it of negligence. *It must appear that the appliance or*

*structure was closer to the rolling stock of the railroad when in motion than ordinarily necessary; but close clearance alone is not enough to sustain a charge of negligence.*

"Coal tipples used in connection with railroads are an absolute necessity to corporate life, business industry, and the development of our resources. These structures must be located with reference to convenience and economical use, as a necessary part of the physical plant, without interference from those who by nature or study are not qualified to set a standard as to their location. *Ordinarily the placement of such structures is for the determination of railroad officers, who in wise administration of the road select them with a view toward protection to the public and their employees, as well as efficient service.* They must know their duty in the premises, and must be at liberty to exercise the sound discretion the law gives them. The correct disposition of these matters establishes a rule of conduct of a permanent nature affecting the entire system. 'On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system. *Southern Pac. Co. v. Berkshire,* 254 U. S. 415, 418, 41 Sup. Ct. Rep. 162, 163 (65 L. Ed. 335). If it did, there would be a constant brake put on the activities of the managing authorities to the discouragement of efficient service.

"Accidents resulting from the close proximity of structures to railroad tracks have been

numerous. The rules of law applicable in such cases have been well stated in *Boyd v. Harris, et al.*, 176 Pa. 484, 488, 35 A. 222. In that case a brakeman employed by defendants was killed by colliding with a cattle chute located near a siding. The court said:

'This case presents a question, the importance of which extends far beyond the present parties and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad necessary to accomodate its business is to be determined by the railroad company or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad and the accomodation of its traffic. If by the latter, these considerations will be lost sight of, and the proper location will be a shifting one to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper. The next jury may hold it to be unsafe and therefore improper.'

"Where they shall be placed and how they shall be arranged are questions that belong to the railroad company as truly as the location of the switches and sidings or of the track itself." (Italics ours.)

The only questions involved in the *McCully* case, which was decided under the Federal Employers' Liability Act, were those of negligence and assumption of risk.

In the case of *Philadelphia & R. Ry. Co. vs. Thirouin*, 9 Fed. (2d) 856 (Third Circuit), it was held that a

clearance of only *11½ inches* between the top of the car and a bridge girder was not negligence as to a brakeman whose duties did not require him to get in a position which would permit him to be struck by the bridge girder. There is no evidence at all in this record that the duties of decedent, Marshall, at the time he was killed, required him to be on the side of a car or lean out therefrom. The burden was on respondent, of course, to affirmatively prove facts tending to show negligence. *Coogan* case, *supra.* Not only does the evidence fail to show that decedent had any duties to perform on the side of a car when passing semaphore 3911, but, if the seventh paragraph of petitioners' answer was properly admitted in evidence, it showed, without dispute, as a fact, (R. 54) that decedent did not go up to the roof of the freight car "as instructed by the conductor of said train," but remained on the side of the car "contrary to said orders and instructions." The statements of facts in this part of petitioner's answer are wholly undisputed and unaffected by any other evidence in the record, and were offered in evidence by respondent. *If this evidence was admissible, all of it must be considered, including that part which is favorable to petitioner.*

*Gunning vs. Cooley,* 281 U. S. 90.

*22 Corpus Juris, title "Evidence,"* Section 499.

*Cohen vs. Robert,* 2 Strobhart, 410, 416 (S. C.).

*Carrier vs. Hague,* 9 Rich. 454, 459 (S. C.).

If decedent was on the side of a car in direct violation of the orders of his superior, and not in the dis-

charge of any duty there, there would be no actionable negligence as to him, as held in the *Thirouin* case. See also

*New York Central R. Co. vs. Ambrose,* 280 U. S. U. S. 486, 491.

Furthermore, the undisputed evidence shows that semaphore 3911 was from 7½ to 10 inches farther from the track than is required by the regulations of the South Carolina Railroad Commission. These regulations (R. 55, 56), which were adopted for the "safety of the general public and employees" of the Railroad, prohibited any structure or obstruction from being erected or maintained "*nearer than 4 feet* from the outer edge of the nearest rail," measurement being made four feet above the top of rail. This Court gave effect to State statutes regulating railroads in the cases of

*Frese vs. C. B. & Q. R. Co.,* 263 U. S. 1, and
*Southern Ry. Co. vs. King,* 217 U. S. 524.

Petitioner submits that if full compliance with the foregoing state regulations as to the distance of structures from the track should not be deemed to conclusively show the exercise of due care, such compliance should at least be *prima facie* evidence of the exercise of due care in placing structures along the track and should be given controlling effect in a case like this one, where the evidence wholly fails to show that an employee on the side of a car, himself in the exercise of due care, would probably be struck by the semaphore. As heretofore pointed out, the evidence

shows only that the base of this semaphore was from 4 feet 7½ inches to 4 feet 10 inches from the nearest rail. It does not show how far a car would project over the rail, or the distance between a car and the semaphore or any other fact which would indicate that the semaphore was so close to the track as to endanger the safety of employees in the course of their duties. The burden of providing facts reasonably tending to show that this semaphore was negligently placed too close to the track, was upon respondent.

*Coogan* and *Gunning* cases, *supra.*

This, respondent has wholly failed to do. Not only has respondent failed to produce evidence tending to show negligence, but the evidence tends to show that the present obstruction was farther from the track than the obstruction involved in most or all of the cases hereinbefore discussed in which the court held that there was no negligence.

In the case of *Central of Georgia R. R. vs. Davis,* 7 Fed. (2d) 269, *certiorari* denied in 269 U. S. 578, relied on by respondent in the state court, the mail crane case involved was only *3 or 4 inches* from the outside of a passing coach. Here the danger of being struck was obvious. In the instant case the evidence wholly fails to show how near the semaphore a passing train would be. Petitioner earnestly submits, therefore, that respondent has wholly failed to prove any negligence, and that the decision of this court in the *Tyner* case, reversing the judgment for plaintiff under the authority of the *Leitch* case and others, is conclusive against liability on the facts in this record.

II.

**The evidence is wholly insufficient to show the cause of decedent's death and leaves that question entirely to conjecture.**

This question is raised by petitioner's fifth exception (R. 74).

In reversing the judgment for respondent on the former trial in the case of *Atlantic Coast Line Railroad Co. vs. Tyner*, 278 U. S. 565, this court cited, as one of its reasons for reversal, the case of *C. M. & St. P. R. Co. vs. Coogan*, 271 U. S. 472, thereby clearly indicating, petitioner submits, that the evidence on the first trial was insufficient to show the cause of decedent's death, and left the matter to speculation. Unless facts tending to show the cause of death can be arbitrarily taken from petitioner's plea of contributory negligence, which the State courts permitted to be introduced in evidence, the present record is wholly devoid of even any suggestion as to the cause of decedent's death, *because it does not show that decedent was on any car near the semaphore, or even show that he was on any train of petitioner the night he was killed.* We take it that no argument is needed to demonstrate that in this state of the evidence the *Coogan* case applies to defeat recovery.

It is true that the State Supreme Court did not in so many words attempt to use the facts in petitioner's plea of contributory negligence to show the cause of decedent's death, although it sustained the admission of that plea as evidence, but that court apparently attempted to show that the other evidence was sufficient

to sustain a finding as to the cause of death, as appears from the following quotation from its opinion (R. 92):

> "Fortunately for the plaintiff in this case, the circumstances are so many and so well knit together that a judge would be required to submit the facts and circumstances to a jury even in a criminal case. We have a strong young man twenty-five years of age, healthy and able-bodied, *in good health and apparent good spirits at the beginning of the trip,* with no known physical infirmity or defect; he is found dead beside the railroad track *a few moments after having been seen alive by his companions.* The dew on the ground is disturbed, the semaphore post *shows unmistakable evidence of having been struck* and there is evidence of human blood upon it; the skull of the deceased is found crushed, evidently from a lick of some terriffic force. *This tends to establish the rate of speed of the train, the fact that the post was too close to the track,* that *the deceased was on the side of the car riding where he had a right to ride* and where his duty often called him to ride and at a place provided for him to ride upon, that the cars were swaying and that his head came into collision with the semaphore post with a terriffic blow and caused him to be killed. *Foggy and dark,* the eye of man could not see and the eye of God will not disclose the exact manner of his death but these mute and silent circumstances, unchanged and unchangeable, speak silently of the manner and circumstances thereof." (Italics ours.)

The vice of this argument is that none of the facts and conclusions which we have italicized are to be

found in the present record; for example, there is no evidence whatever to support the statements that decedent was "in good health and apparent good spirits at the beginning of the trip", or was found dead "a few moments after having been seen alive by his companions", or that it was "foggy and dark", or that the semaphore post "shows unmistakable evidence of having been struck". These facts, thus improperly assumed by the State Supreme Court to exist, must be eliminated from consideration. That court's conclusion in the above quoted paragraph, therefore, that "this tends to establish the rate of speed of the train, the fact that the post was too close to the track, that the deceased was on the side of the car riding where he had a right to ride", is utterly unsupported by any evidence; and we further submit that if there were evidence in the record to show all of the facts stated in this paragraph of the opinion, they would not support the court's conclusion that decedent was riding on the side of the car when struck, and that the semaphore was too close to the track. The only facts in evidence on the second trial which were not in the evidence on the first trial (although a number of facts were in evidence in the first trial which were not put in evidence on the second trial), was testimony by decedent's brother-in-law, who arrived at the scene of the accident nine or ten hours after it happened and after a number of people had been around the semaphore, that he found "apparently blood stains" on the north side of the semaphore casing six or seven inches above

where the smoke and soot had apparently been wiped off (R. 49), and also testimony by this witness and a physician who exhumed the body some six years after the accident (R. 30, 49), that decedent had received a terrific blow on the back part of his head, crushing his skull. It is apparent that these facts do not even tend to show that decedent was riding on the side of a car and came to his death by striking a semaphore, as alleged in the complaint.

*Coogan* case, *supra.*

*Philadelphia & R. Ry. Co. vs. Thirouin,* 9 Fed. (2d) 856, 857 (3d Circuit).

The following from the *Thirouin* case is very pertinent:

> "It is argued that in searching for the trouble he may have leaned out beyond the car just as it came to the end of the bridge and that he may have leaned so far out that he was struck and swept off the train by the center girder. That may be true, but there is no evidence to prove it. Blood on one end of a girder and a foot at the other end of the same girder and the body on the opposite side of the track against another girder open a wide field for speculation as to how the accident happened and leave nothing certain except the fact of injury and death."

So far as its opinion shows, the State Supreme Court, apparently, did not rely on the facts contained in petitioner's plea of contributory negligence to show the cause of death, but erroneously concluded that the other facts it improperly assumed to be in evidence showed the cause of death. It may be, therefore, that

petitioner would be justified in relying on the error of the State Supreme Court in reaching this conclusion, without discussing the error of that court in admitting petitioner's plea in evidence and, we assume, giving it effect as such. But inasmuch as the facts in this plea should be given effect as evidence, if it were properly admitted, we will briefly discuss that question.

(a) *The State courts erred in arbitrarily admitting in evidence petitioner's plea of contributory negligence and in giving it effect as evidence.*

This question is raised by petitioner's first exception (R. 71).

Petitioner's counsel concede that, ordinarily, matters of procedure and practice are questions for determination of the state courts in actions brought under the Federal Employers' Liability Act, and the decision in these matters, fairly arrived at, will not as a rule be reversed by this Court. However, this Court has also held that a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice adopted by a state or state court.

*Norfolk Southern R. Co. vs. Ferebee,* 238 U. S. 269.

It has likewise held in the *Coogan* case, *supra,* and other cases, that both the *kind* and amount of evidence necessary to impose liability under the Federal Act is for the final determination of this Court. It is petitioner's contention, under this heading, that the admission in evidence of the seventh paragraph of the answer pleading contributory negligence (R. 54) was

arbitrary and unauthorized, and that the facts necessarily stated in this plea only for the purpose of this particular defense, cannot be deemed that kind of evidence which is necessary to impose liability. The plea itself, which was admitted in evidence, is set out on page 54 of the record, page 6 of the petition, and need not be repeated. It is the usual plea of contributory negligence as used in the Code states, and is stated to be a further answer to the complaint "and for a further defense to said action". The first part of petitioner's answer in denial (R. 7) admitted the allegations of the first, third and fourth paragraphs of the complaint, and then the second paragraph of the answer contained *a general denial of "each and every other allegation in said complaint not hereinbefore or hereinafter specifically* admitted." The answer nowhere "specifically admits" that decedent was on any car or the side of a car when it passed the semaphore, but the plea of contributory negligence or any plea in the nature of one of confession and avoidance, which a plea of contributory negligence is, must necessarily admit, either expressly or impliedly, the facts constituting the basis of the cause of action. At common law, as well as under the various Codes, this is denominated the "confession" part of the plea or "giving color". 49 *Corpus Juris, title "Pleading", Section* 357. Indeed, it is often held that an affirmative defense of new matter in the nature of a plea in confession and avoidance is bad where it contains merely a hypothetical admission of plaintiff's cause of action, although some Code states apparently permit, though do not require, hypothetical admissions. 49

*Corpus Juris, supra,* Section 358. We submit, therefore, that petitioner's answer when fairly construed under the usual rules of practice in force in South Carolina and elsewhere contains no admissions which may properly be used as evidence that decedent was on the side of a car and was struck by a semaphore. The cases cited by the State Supreme Court in its opinion on the question are not in point. In the case of *McJimpsey vs. So. Ry.*, 89 S. C. 122, cited by it, the general denial contained in the answer was only of every *material* allegation of the complaint and the court said it was doubtful whether this constituted a general denial, as it left uncertain what defendant considered "material" and, hence, the court gave effect, as evidence, to an admission in other parts of the answer that plaintiff was on defendant's cars. The difference in the general denials distinguishes the *McJimpsey* case.

The case of *Blake vs. Southern Ry.*, 126 S. C. 407, cited by the State Supreme Court, is distinguishable, as pointed out in the dissenting opinion of Cothran, J., because there defendant's second defense specifically stated that plaintiff was employed in interstate commerce, making that an admitted fact in the case. Cothran, J., wrote the opinion in the *Blake* case. The true rule applicable is well stated in the leading South Carolina case of *Stanley vs. Schoolbred*, 25 S. C. 181 (191), from which we quote:

> "But should we be in error in this, it would be necessary to inquire further, whether any evidence appears in the case tending to show that defendant was in possession of, or had trespassed upon, any of the land described in

the complaint. No witness has testified that the defendant has trespassed upon, or is in the possession of, any land claimed by the plaintiff, or, indeed, of any land at all. To establish this part of his case, *the plaintiff relies entirely upon the admissions in the answer.* We will first consider the admissions supposed to be made by the defendant, in pleading her second defense. Waiving any question (about which there might be grave doubt), as to whether the language there used would amount to an admission that the defendant was in possession of any portion of either Harris or the Jeffries grants, which, so far as we can understand, is the land to which the plaintiff claims title, it is sufficient to say that it is well settled that where a defendant pleads two defenses—one a general denial, *and the other by way of confession and avoidance, any admission contained in the latter cannot be resorted to by the plaintiff to establish the issue raised by the former.*

"As is said by *Pomeroy* in his work on *Remedies,* at page 743, Section 724: 'When a denial is pleaded in connection with a defense of new matter, or two defenses of new matter are set up, the admissions in the one can never be used to destroy the effect of the other. *The concessions of a defense by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal.*' And again this standard author on the Code, at page 630, section 578, in speaking of the effect of the admissions of one of several defendants who have put in separate answers, says: 'The same doctrine extends to separate defenses of one party

in a single answer; the admissions in a defense of confession and avoidance do not overcome the effect of a denial contained in another.' Indeed, any other rule would, practically, deny to a party the right to plead a general denial, and a second defense by way of confession and avoidance. We think it is quite clear that any admission (if there is any) to be found in the second defense here pleaded cannot be resorted to, for the purpose of establishing the issue raised by the first defense." (Italics ours.)

The exact point in question was determined in *Charping vs. Toxaway Mills*, 70 S. C. 470, where it is said:

"It was held, nevertheless, in *Milean v. Ry. Co.*, 54 S. C. 485, 32 S. E. 539, the defense of contributory negligence may be pleaded in an answer which also sets up a general denial of all negligence on the part of the defendant, because any number of inconsistent defenses may be set up in the same pleading. *Cohrs. v. Fraser*, 5 S. C. 351; Code of Civil Procedure, Sec. 171. It has been held further, that where the defendant pleads a general denial and a further defense by way of confession and avoidance, *the admissions of the latter cannot be used by the plaintiff to establish the issues raised by the general denial. Stanley v. Schoolbred*, 25 S. C. 181; *Gilbreath v. Furman*, 57 S. C. 289, 293, 35 S. E. 516." (Italics ours.)

See also the following cases:

*Brock vs. Nelson*, 29 S. C. 49 (52).

*Gilbreath vs. Furman*, 57 S. C. 289 (293).

*Hickson vs. Early*, 60 S. C. 42 (51).
*Glenn vs. Sumner*, 132 U. S. 152.
*Smith vs. Gale*, 144 U. S. 509, 524.

In the *Glenn* case, *supra.*, this court said:

"In the record sent up the verdict unequivocally states that the jury 'find all issues in favor of the defendant', and the judgment repeats that 'all the issues raised by the pleadings' were so found. This necessarily includes a finding that the defendant was never liable to pay the assessment. This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defenses *matters in avoidance*, or in a bill of exceptions, relating to one of those defenses only. *Such statements, made for the purpose of presenting the issue to which they relate, are not evidence upon any other issue in the same record.* As held by Chief Justice Marshall, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, *he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. Whitaker v. Freeman*, 1 Dev. L. 271, 280. See also *Knight v. McDougall*, 12 Ad. & El. 438, 442; *Gould v. Oliver*, 2 Man. & Gr. 208, 234; S. C. 2 Scott, N. R. 241, 262." (Italic ours.)

The italicized language is directly applicable to the question under discussion.

In the case of *Smith vs. Gale, supra.*, in which this court distinguishes the case of *Glenn vs. Sumner*, it is stated that there are "no inconsistent defenses" in the

*Smith* case. Certainly, the defense of contributory negligence is wholly inconsistent with a denial of liability by defendant, which petitioner's answer does deny. It is also stated in the *Smith* case that the defense there "is in reality a single one". In the instant case the answer not only contained a general denial, but contained in the fifth and sixth paragraphs (R. 9) a "further defense" of assumed risk, which is a plea of new matter in the nature of a plea of confession and avoidance, and also contained in the seventh paragraph a similar plea of contributory negligence. Many other cases in point on this question are cited in the dissenting opinion of Cothran, J.

We submit that the action of the State courts in admitting this plea in evidence and permitting its consideration as such, was wholly arbitrary and unauthorized, *and that the matter contained* in such plea *cannot be considered as evidence to supply any fact imposing liability.*

III.

**Under the evidence, decedent assumed, as a matter of law, any risk of injury from the position of the semaphore.**

This question is raised by petitioner's fourth exception (R. 73, 74).

In its opinion reversing the judgment for respondent in the case of *Atlantic Coast Line Railroad Company vs. Tyner* this court cited the cases of

*Southern Pac. Co. vs. Berkshire*, 254 U. S. 415.

*C. & O. Ry. vs. Leitch*, 276 U. S. 429.

thus unmistakably indicating its opinion that under the evidence then in the record, the decedent assumed the risk of injury from the semaphore. The evidence on the second trial, and now in the record on the question of assumed risk, is not greatly different on material matters from that in the evidence at the first trial. The undisputed evidence shows that decedent, Marshall, was an experienced railroad man, and had worked in the Charleston yard as a switchman three weeks at the time he was killed, and for about three months before that time at the same place (R. 12). All of the switchmen in the yard go out to Bennett's Yard near by where trains are also made up (R. 40), and decedent must have, necessarily, gone out there (R. 41); his work as switchman took him constantly up and down the road (R. 42); the semaphore had been in the same condition at least since 1919 (R. 43), the accident occurring in 1923. Semaphore 3911 is on a straight piece of track (R. 20). All switchmen and railroad men know about semaphores being along side the track (R. 53), and also know that freight cars sway from side to side from ten to twenty inches, according to respondent's testimony (R. 40, 41, 42, 45, 46 and 47). Rule No. 706, in effect when decedent was killed, reads (R. 53):

> "Employes are required to inform themselves respecting the location of all *structures or obstructions along the line which will not clear them when on top or sides of cars.*"

Under these facts and under the *Berkshire* and *Leitch* cases, cited by this court as reasons for revers-

ing the first judgment rendered, decedent assumed any risk of injury from contact with this semaphore. In the *Berkshire* case the court said that the engineer had passed over the route many times "and must be presumed to have known of the crane" The same inference must be made in this case, as decedent had, according to the evidence, constantly ridden up and down the road in the course of his duties (R. 42). Proof of actual, admitted knowledge by the employe, of danger from the semaphore, and his appreciation thereof, can rarely be shown in this class of cases, especially where the employe is killed in the accident. The remarks of the State Supreme Court in its opinion, therefore, that there cannot be assumption of risk in this case, in the absence of proof that the risk was fully known and appreciated by decedent, are beside the point. The *Leitch* case, which we discussed and quoted from in our discussion on negligence, is also directly applicable to these facts on the question of assumed risk. The State Supreme Court took the position in its opinion that both the *Berkshire* and *Leitch* cases were restricted in their operation to "mail crane cases", but it is apparent that this cannot be true, or else this court would not have specifically cited these cases in its opinion reversing the judgment for plaintiff on the first trial of this action (*A. C. L. R. R. Co. vs. Tyner*, 278 U. S. 565).

In the case of *McCully vs. Monongahela*, 289 Pa. 393, *certiorari* denied 275 U. S. 542, it was also held that the trainman assumed, as a matter of law, the risk of injury from the coal tipple. There the trainman had made several trips along the route.

Furthermore, if petitioner's plea of contributory negligence, which was put in evidence by respondent, is properly in evidence, it shows, without dispute, that the "*presence and location*" of the semaphore mentioned in the complaint were well known to the deceased. Respondent put in evidence the whole of the seventh paragraph of petitioner's answer (R. 10), and the court instructed the jury that they could consider all the facts set out in that paragraph (R. 73), which include those above quoted. There is no other evidence conflicting with any fact stated in this part of the answer, or even remotely bearing thereon: hence, there is no reason whatever why all of the facts stated therein should not be taken as true, if any of them are, and neither the court nor the jury could arbitrarily or capriciously say that some of the facts are true and others are not. It would be most unfair if respondent were permitted to introduce the whole of this plea in evidence and then maintain that only the part of it which was favorable to respondent should be considered as having any legal effect. The law is to the contrary. The rule is stated in 22 *Corpus Juris*, title "*Evidence*", *Section* 449, as follows:

> "When an entire statement is admitted in evidence, *the self-serving part of it must be duly considered and weighed together with the unfavorable part.*
>
> "But all parts of the statement are not necessarily to be regarded as worthy of equal credit. The triers of fact may reject such portions, if any, as appear to be inconsistent, improbable, or rebutted by other circumstances in evidence;

*but they are not at liberty to disbelieve the self-serving part capriciously and without any reasonable grounds;* and it has been said that they cannot believe part and disbelieve another part unless such parts are distinct and relate to different matters or facts. The assertion of a legal right to do an act, coupled with an admission that the party did the act, does not neutralize the admission." (Italics ours.)

The same rule is laid down in the South Carolina cases of

*Cohen vs. Robert,* 2 Strobhart, 410-416 (S. C.).
*Carrier vs. Hague,* 9 Rich. 454, 459.

In the latter case the Supreme Court of South Carolina said:

> "Prior to the opening of the defense the plaintiff resorts to the answer and produces it as evidence in his behalf. He must take it as it stands, and cannot be permitted to carve out a part and reject the residue, which qualifies, explains or pertains to the portion selected."

In the *Cohen* case it is held that where plaintiff put in evidence defendant's affidavit as an admission of the trespass complained of, plaintiff "thereby also made evidence the defendant's declaration, in the same affidavit, of the circumstances which incited him to the violence he committed" and could not exclude such declarations from consideration.

The principle enunciated by this court in *Gunning vs. Cooley,* 281 U. S. 90 is also applicable. It is there said that where plaintiff produces evidence that is

consistent with a hypothesis that defendant is not negligent, and also with one that he is, *his proof tends to establish neither*. Here respondent offered a part of our answer, apparently, to show that decedent was on the side of a train and struck a semaphore, but this same part of the answer which was put in the evidence by respondent also showed that he well knew the "presence and location" of this semaphore, which would make him assume the risk of injury therefrom as a matter of law, under the foregoing cases, and petitioner earnestly submits that this must be the effect of this evidence (if it were admissible at all), as well as of the other evidence hereinbefore referred to.

## Conclusion.

This case has been tried twice and judgment for large amounts rendered in each trial for respondent. The judgment on the first trial was reversed on certiorari by this court in an opinion citing authorities already mentioned, which made it certain that, in the judgment of this court, the evidence on the first trial was conjectural as to the cause of the accident, and also showed assumption of risk as a matter of law, together with the citation of another case on the error in the first trial in instructions on damages. As we have attemmpted to point out, the evidence on the second trial is much less specific as to the facts and much weaker as going to show negligence or the cause of the injury, and is even stronger as showing assumption of risk by the decedent. We submit, therefore, that the decision of this case is governed by the decision on the former appeal in the Tyner case, and that decision

and the cases therein cited require the reversal of the present judgment. In as much as respondent has had the opportunity in two trials to develop facts imposing liability on petitioner, and has wholly failed to do so, the judgment should now be reversed without ordering a new trial.

Respectfully submitted,

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